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THE UNRUH CIVIL RIGHTS ACT: A WEAPON TO COMBAT HOMOPHOBIA IN MILITARY ON- CAMPUS RECRUITING

I. INTRODUCTION

Each fall and spring, professionally dressed students hurry across the campuses of most California universities to job interviews. Students obtain these interviews through their schools' Career Placement Centers, which act as a link between university students and both private and public sector employers.¹ Many Career Placement Centers offer workshops on effective interviewing and resume writing. More importantly, however, these centers coordinate the interviews which bring employers to campuses in order to offer employment to students.²

When scanning the lists of interviewing employers, students often find that the United States Army, Navy, Air Force and Marines have been scheduled to conduct on-campus interviews.³ Gay and lesbian students, however, may refrain from submitting their resumes to these employers because of the military's well-known policy of discrimination against homosexuals.⁴ Although courts have held that the military may

1. See GOLDEN GATE UNIV., PUB. NO. 4, BULLETIN 42 (1990); 30 UNIVERSITY OF CAL., HASTINGS COLLEGE OF LAW, ANNOUNCEMENT 20 (1990); UNIVERSITY OF CAL., LOS ANGELES, PUB. NO. 4, SCHOOL OF LAW 39 (1990).

2. See GOLDEN GATE UNIV., *supra* note 1, at 42; LOYOLA MARYMOUNT UNIV., PUB. NO. 3, LOYOLA LAW SCHOOL BULLETIN 43 (1988); 31 STANFORD UNIV., PUB. NO. 95, BULLETIN 47 (1990); 80 UNIVERSITY OF CAL., BERKELEY, PUB. NO. 16, BOALT HALL SCHOOL OF LAW 17 (1986); 29 UNIVERSITY OF CAL., DAVIS, PUB. NO. 4, SCHOOL OF LAW 20 (1989); UNIVERSITY OF CAL., LOS ANGELES, *supra* note 1, at 39.

3. See L.A. Times, Feb. 21, 1991, at A9, col. 3 (student protest planned at Occidental College's military recruiting center); Nat'l L.J., Dec. 31, 1990-Jan. 7, 1991, at 17, col. 1 (schools discussed barring military from on-campus interview programs); San Francisco Chron., Oct. 12, 1990, at B7, col. 1 (Boalt Hall law students wore pins to protest military recruiting on campus).

4. The military's exclusionary policy is explained as follows:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services [1] to maintain discipline, good order, and morale; [2] to foster mutual trust and confidence among servicemembers; [3] to ensure the integrity of the system of rank and command; [4] to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; [5] to recruit and retain members of the Military Services; [6] to maintain the public acceptability of military service; and [7] to prevent breaches of military security.

32 C.F.R. pt. 41 app. A, pt. 1(H)(1)(a) (1990).

lawfully discriminate against homosexuals,⁵ the question remains open whether California universities impermissibly discriminate against gays and lesbians by allowing the military to participate in on-campus recruiting programs. In California, business establishments must provide "full and equal accommodations, advantages, facilities, privileges, or services" to all persons within the jurisdiction of the state.⁶ California's Unruh Civil Rights Act⁷ (the Unruh Act) protects all persons, including gays and lesbians⁸ from arbitrary discrimination.⁹ Federal courts in California, however, have upheld the military's policy barring gays and lesbians from service.¹⁰ A necessary premise underlying these holdings is that state laws attempting to prohibit military discrimination are preempted by military regulations.¹¹

This Comment argues that California universities that allow the military to participate in career placement programs violate the Unruh Act. It first explains the broad interpretation that California courts have given the Unruh Act. It then discusses *United States v. City of Philadelphia*,¹² the one case which has examined whether state and local anti-discrimination laws may bar military recruiters from college campuses. This Comment argues that the *City of Philadelphia* court erred in holding that state and local anti-discrimination laws are preempted by federal law.¹³ The Comment examines the relationship between military recruiters and universities and concludes that this type of cooperation is barred by the Unruh Act. It demonstrates that universities are bound by the Unruh Act and that they violate it by providing unequal services to homosexual

5. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 575 (9th Cir. 1990); *Pruitt v. Weinberger*, 659 F. Supp. 625, 627 (C.D. Cal. 1987).

6. CAL. CIV. CODE § 51 (West Supp. 1991). The Unruh Act reads in pertinent part: All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Id.

7. *Id.*

8. See *infra* notes 36-58 and accompanying text.

9. *Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 75, 707 P.2d 212, 214, 219 Cal. Rptr. 150, 152 (1985).

10. See *High Tech Gays*, 895 F.2d at 575; *Pruitt*, 659 F. Supp. at 627.

11. See *High Tech Gays*, 895 F.2d at 575; *Pruitt*, 659 F. Supp. at 627; U.S. CONST. art. VI, cl. 2.

12. 798 F.2d 81 (3d Cir. 1983).

13. Generally, federal law preempts state law in one of three ways: (1) Congress expressly preempts state law, *English v. General Elec. Co.*, 110 S. Ct. 2270, 2275 (1990); (2) a state law regulates conduct in a field that Congress intended the federal government to occupy exclusively, *id.*; or (3) a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

students. Finally, this Comment proposes that California universities should voluntarily stop their unlawful practices or face potential liability.

II. BACKGROUND

A. *The Legislative History of the Unruh Civil Rights Act*

In *The Civil Rights Cases*,¹⁴ the United States Supreme Court invalidated the public accommodations sections of the Civil Rights Act of 1875, which guaranteed that all persons within the United States should be entitled to the "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement. . . ."¹⁵ Many states reacted by enacting their own public accommodations statutes.¹⁶ California enacted its original public accommodations law in 1897,¹⁷ which prohibited discrimination in a number of enumerated establishments¹⁸ and, more generally, in "all other places of public accommodation and amusement."¹⁹ The California Supreme Court held that although the statute was a derogation of the common law, it was to be liberally construed to effect its objectives.²⁰

California courts limited the scope of the public accommodations statute in the late 1950s.²¹ In a series of cases, courts held that the phrase "all other places" only encompassed places similar to those already enumerated in the statute.²² Consequently, the courts exempted a

14. 109 U.S. 3 (1883).

15. Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335, 336. The Supreme Court overturned these provisions, holding that the federal Constitution does not protect persons from the acts of private individuals. *Civil Rights Cases*, 109 U.S. at 24-25.

16. Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443, 445 (1983). Though states' definitions of public accommodations differ, establishments such as hotels, taverns, restaurants, and recreational areas open to the public, are usually viewed as public accommodations. *Id.* at 448 n.28. By 1909, 18 states had enacted public accommodations statutes. Maslow & Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 405 (1953).

17. Act of Mar. 13, 1897, ch. 108, 1897 Cal. Stat. 137 (current version at CAL. CIV. CODE § 51 (West Supp. 1991)). The original act read in part: "[A]ll citizens within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement. . . ." *Id.*

18. *Id.*

19. *Id.*

20. *Orloff v. Los Angeles Turf Club*, 30 Cal. 2d 110, 113, 180 P.2d 321, 323 (1947).

21. See *Reed v. Hollywood Professional School*, 169 Cal. App. 2d Supp. 887, 338 P.2d 633 (1959) (private school exempted from coverage of public accommodations law); *Coleman v. Middlestaff*, 147 Cal. App. 2d Supp. 833, 305 P.2d 1020 (1957) (dentist's office exempted from coverage of public accommodations law).

22. *E.g., Reed*, 169 Cal. App. 2d Supp. at 889, 338 P.2d at 635; *Coleman*, 147 Cal. App.

cemetery association,²³ a dentist's office²⁴ and a professional school²⁵ from the coverage of the public accommodations statute. In response to the public objection to these decisions, the California legislature revised the statute in 1959.²⁶ As amended, the new statute, known as the Unruh Civil Rights Act, broadened the scope of the public accommodations law.²⁷ The change made the statute applicable to *all* business establishments, as opposed to public accommodations only, and it reflected the legislature's intent to broaden the coverage of the law.²⁸

Since the 1959 amendment, California courts have construed the Unruh Act liberally to effect the legislative purposes of preventing arbitrary discrimination and promoting justice.²⁹ In determining what types of business establishments fall under the Unruh Act, courts have interpreted the legislature's choice of the words "all" and "of every kind whatsoever" as indicating its intent that the phrase be interpreted as broadly as reasonably possible.³⁰ At least one court has viewed this wording as indicative of a legislative intent to include all private and public groups or organizations that might reasonably be found to constitute any type of business establishment.³¹ The California Supreme Court expressly recognized the legislative intent underlying the Unruh Act as a desire to banish discriminatory practices from California's community

2d Supp. at 834, 305 P.2d at 1021; *Long v. Mountain View Cemetery Ass'n*, 130 Cal. App. 328, 329, 278 P.2d 945, 946 (1955).

23. *Long*, 130 Cal. App. 2d at 329, 278 P.2d at 946.

24. *Coleman*, 147 Cal. App. 2d Supp. at 834-35, 305 P.2d at 1021.

25. *Reed*, 169 Cal. App. 2d Supp. at 890, 338 P.2d at 636.

26. See Unruh Civil Rights Act, ch. 1866, § 1, 1959 Cal. Stat. 4424, 4424 (current version at CAL. CIV. CODE § 51 (West Supp. 1991)); see also Comment, *supra* note 16, at 450-51 (explaining how public pressed for amendment of the law).

27. The Unruh Act, in 1959, provided in pertinent part: "All citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West 1959) (current version at CAL. CIV. CODE § 51 (West Supp. 1991)).

The statute was named after Jesse Unruh, an influential state assemblyperson who later became speaker of the California Assembly from 1961 to 1968. See N.Y. TIMES, Aug. 6, 1987, at B6, col. 1. Jesse Unruh was appointed California State Treasurer in 1974 and died in 1987. *Id.*

28. See *Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 84, 707 P.2d 212, 219, 219 Cal. Rptr. 150, 157 (1985); *In re Cox*, 3 Cal. 3d 205, 216, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970).

29. See *Isbister*, 40 Cal. 3d at 76, 707 P.2d at 219, 219 Cal. Rptr. at 157; *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 147 Cal. App. 3d 712, 727, 195 Cal. Rptr. 325, 334 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

30. See *Isbister*, 40 Cal. 3d at 78, 707 P.2d at 215, 219 Cal. Rptr. at 153; *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 468, 370 P.2d 313, 315-16, 20 Cal. Rptr. 609, 611-12 (1962).

31. *Isbister*, 40 Cal. 3d at 79, 707 P.2d at 216, 219 Cal. Rptr. at 154.

life.³² As a result, the Unruh Act has been held applicable to both profit³³ and non-profit entities.³⁴

B. Construction of the Unruh Act

California courts have read the Unruh Act with great deference to its underlying policy of preventing discrimination.³⁵ The following cases illustrate how far the courts have been willing to extend the coverage of the Unruh Act with respect to: (1) the classes of persons protected; (2) the types of businesses bound; and, (3) the types of services that must be provided equally.

1. The protected classes

Prior to the 1959 amendment expanding the coverage of California's public accommodations statute,³⁶ the California Supreme Court interpreted the statute as protecting classes other than those listed on its face. In *Stoumen v. Reilly*,³⁷ the court decided that homosexuals were protected from arbitrary discrimination under the public accommodations law although there was no precise language in the statute referring to homosexuals as a protected minority.³⁸ The plaintiff in *Stoumen* was the proprietor of a gay bar.³⁹ The State Board of Equalization had suspended the plaintiff's license to sell alcohol⁴⁰ because he kept a "disorderly house." The "disorderly house" concept was based upon the fact that homosexuals patronized the bar and used it as a meeting place.⁴¹ The court held that the plaintiff's liquor license was wrongly revoked because the public accommodations law prohibited proprietors from excluding or ejecting patrons except for good cause.⁴² The mere fact that the patrons were gay was an insufficient basis under the Unruh Act for a

32. *Id.* at 76, 707 P.2d at 214, 219 Cal. Rptr. at 157.

33. *Burks*, 57 Cal. 2d at 468, 370 P.2d at 316, 20 Cal. Rptr. at 612.

34. *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 796, 662 P.2d 427, 431, 191 Cal. Rptr. 320, 324 (1983).

35. *See Isbister*, 40 Cal. 3d at 75-76, 707 P.2d at 214, 219 Cal. Rptr. at 151-52; *Burks*, 57 Cal. 2d at 468, 370 P.2d at 316, 20 Cal. Rptr. at 612.

36. Unruh Civil Rights Act, ch. 1866, § 1, 1959 Cal. Stat. 4424, 4424 (current version at CAL. CIV. CODE § 51 (West Supp. 1991)).

37. 37 Cal. 2d 713, 234 P.2d 969 (1951).

38. *See id.* at 716, 234 P.2d at 971.

39. *Id.* at 715, 234 P.2d at 970.

40. *Id.* at 714-15, 234 P.2d at 970.

41. *Id.* at 715, 234 P.2d at 970.

42. *Id.* at 716, 234 P.2d at 971. The court explained that "mere proof of [homosexual] patronage, without proof of immoral or illegal acts on the premises" was insufficient to show that the plaintiff kept a disorderly house. *Id.* Presumably, proof of immoral or illegal acts would have constituted good cause for suspension of the liquor license. *Id.* A customer's

proprietor to refuse a customer service.⁴³ Because the proprietor could not refuse to serve customers based on their sexual orientation, the state could not revoke the plaintiff's license for not ejecting his gay customers.⁴⁴ Accordingly, the court granted a writ of mandate directing the board to set aside its suspension of the liquor license.⁴⁵

In 1970, the California Supreme Court again illustrated its commitment toward expanding the scope of groups protected by the Unruh Act in the landmark case, *In re Cox*.⁴⁶ In *Cox*, Theodore Cox was arrested for violating a municipal trespass ordinance by remaining on business premises after being asked to leave by a mall security guard.⁴⁷ The security guard had asked Cox and his companion to leave based on their appearances: Cox and his friend had long hair and wore motorcycle clothing.⁴⁸ The court held that a business establishment could promulgate reasonable deportment regulations as long as such regulations were rationally related to the services performed and the facilities provided.⁴⁹ Factors considered by the court as being acceptable for deportment included whether customers had damaged property, injured others, or otherwise disrupted the business.⁵⁰ The court in *Cox* made it clear, however, that the shopping center did not have an absolute power arbitrarily to eject would-be customers from its premises.⁵¹

In reaching this conclusion, the *Cox* court traced the legislative history of the Unruh Act.⁵² At the time, the Unruh Act only expressly prohibited discrimination on the basis of color, race, religion, ancestry and national origin.⁵³ The court, however, found the listed categories to be an illustrative, rather than exhaustive, list of the types of classes covered by the Unruh Act.⁵⁴ The court also rested its conclusion on the reasoning set forth in *Stoumen*.⁵⁵ It found, therefore, that the legislature

homosexuality, however, would not constitute sufficient cause for a proprietor to refuse service. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 718, 234 P.2d at 972.

46. 3 Cal. 3d 205, 210-11, 474 P.2d 992, 994-95, 90 Cal. Rptr. 24, 26-27 (1970).

47. *Id.* at 210, 474 P.2d at 994, 90 Cal. Rptr. at 26.

48. *Id.* at 217-18, 474 P.2d at 1000, 90 Cal. Rptr. at 32.

49. *Id.* at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31.

50. *Id.*

51. *Id.* at 209, 474 P.2d at 993, 90 Cal. Rptr. at 25.

52. *Id.* at 213-16, 474 P.2d at 996-99, 90 Cal. Rptr. at 28-31.

53. CAL. CIV. CODE § 51 (West 1970) (current version at CAL. CIV. CODE § 51 (West Supp. 1991)). Since 1959, the legislature has added sex, blindness and other physical disability to the list of expressly protected classes. See CAL. CIV. CODE § 51 (West Supp. 1991).

54. *Cox*, 3 Cal. 3d at 212, 474 P.2d at 995, 90 Cal. Rptr. at 27.

55. *Id.* at 214, 474 P.2d at 997, 90 Cal. Rptr. at 29 (citing *Stoumen v. Reilly*, 37 Cal. 3d

intended to prohibit *all* arbitrary discrimination by business establishments.⁵⁶ The broad reading which courts have afforded the Unruh Act has, therefore, been construed as protecting gays and lesbians from arbitrary discrimination.⁵⁷ Relying largely on *Stoumen* and *Cox*, one court found it clear that gays and lesbians were protected under the Unruh Act.⁵⁸

2. Establishments bound by the Unruh Act

The Unruh Act is binding upon "all business establishments of every kind whatsoever."⁵⁹ Thus, for the Unruh Act to apply, the plaintiff must establish that the defendant is a business establishment.⁶⁰ What constitutes a business establishment, however, has been the subject of much judicial interpretation. In *Isbister v. Boys' Club of Santa Cruz*,⁶¹ the California Supreme Court, reversing the appellate court,⁶² held that the Boys' Club violated the Unruh Act by denying membership to girls.⁶³ In deciding that the Boys' Club was a business establishment, as defined in the Unruh Act, the court relied on the legislature's desire to banish arbitrary discrimination from the state.⁶⁴ This reliance led the court to interpret the Unruh Act's coverage as broadly as reasonably possible.⁶⁵ The court rejected the Boys' Club's assertion that it was exempt from the Unruh Act because it was a non-profit business.⁶⁶ The *Isbister* court reiterated its intent to read the Unruh Act broadly, noting that the legislature had never added any exemption or exception to the category of business establishments covered by the Act.⁶⁷ Furthermore, the court held that the Unruh Act was not preempted by the congressional charter

713, 234 P.2d 969 (1951)). See *supra* notes 37-45 and accompanying text for a discussion of the *Stoumen* case.

56. *Cox*, 3 Cal. 3d at 216, 474 P.2d at 999, 290 Cal. Rptr. at 31.

57. See *Hubert v. Williams*, 133 Cal. App. Supp. 1, 184 Cal. Rptr. 161 (1982).

58. *Id.* at 5, 184 Cal. Rptr. at 163. In *Hubert*, the court held that a landlord violated the Unruh Act by evicting a quadriplegic tenant and his lesbian attendant because she was gay and he had gay friends. *Id.*

59. CAL. CIV. CODE § 51 (West Supp. 1991) (emphasis added).

60. *Id.*; see *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 147 Cal. App. 3d 712, 727, 195 Cal. Rptr. 325, 334 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

61. 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

62. The appellate court held that the Unruh Act did not apply to non-commercial entities such as charitable organizations, fraternal societies and community service organizations. *Isbister v. Boys' Club of Santa Cruz*, 144 Cal. App. 3d 338, 344, 192 Cal. Rptr. 560, 567 (1983), *vacated*, 40 Cal. 3d 72, 707 P. 2d 212, 219 Cal. Rptr. 150 (1985).

63. *Isbister*, 40 Cal. 3d at 91, 707 P.2d at 224-25, 219 Cal. Rptr. at 162-63.

64. *Id.* at 75-76, 707 P.2d at 214, 219 Cal. Rptr. at 152.

65. *Id.*

66. *Id.* at 82-83, 707 P.2d at 218, 219 Cal. Rptr. at 156.

67. *Id.* at 84, 707 P.2d at 219, 219 Cal. Rptr. at 157.

of the Boys' Club which stated the club's purpose was to "promote the health, social, educational, vocational, and character development of boys."⁶⁸ The court found that allowing girls into the club would not necessarily frustrate this goal.⁶⁹

One California appellate court has held that even the Boy Scouts of America could be found to be a business establishment under the Unruh Act.⁷⁰ In *Curran v. Mount Diablo Council of the Boy Scouts of America*,⁷¹ the plaintiff, who had been a member of the Boy Scouts in good standing for five years, was expelled because he was gay and hence, not a good moral example for younger scouts.⁷²

The court held that the Boy Scouts of America fell under the Unruh Act's definition of business establishment because "the Legislature's intent [was] to use the term in the broadest sense reasonably possible" including "all commercial and noncommercial entities open to and serving the general public."⁷³ The *Curran* court examined the legislative history of the act and its subsequent judicial interpretations to conclude that the term "business establishment" was to be read expansively.⁷⁴ The court also held that exclusion of the plaintiff on the basis of his homosexuality was not permissible under the Unruh Act.⁷⁵ The Unruh Act's primary purpose was seen by this court as compelling "recognition of the equality of all persons in the right to the particular service offered by an organization or entity covered by the act."⁷⁶

The Boy Scouts claimed that enforcing the Unruh Act against it would violate the supremacy clause of the United States Constitution.⁷⁷ The *Curran* court, however, rejected the Boy Scouts contention that the congressional charter which formed the organization in 1916 preempted an Unruh Act claim.⁷⁸ The court relied on a provision of the charter stating that Boy Scout regulations were not to conflict with the laws of

68. *Id.* at 90 n.21, 707 P.2d at 224 n.21, 219 Cal. Rptr. at 162 n.21 (emphasis added). The court found that this charter did not display an unambiguous "congressional intent to preempt." *Id.* (quoting *Perez v. Campbell*, 402 U.S. 637, 649-50 (1971)).

69. *Isbister*, 40 Cal. 3d at 90 n.21, 707 P.2d at 224 n.21, 219 Cal. Rptr. at 162 n.21.

70. *Curran*, 147 Cal. App. 3d at 732-33, 195 Cal. Rptr. at 338.

71. 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

72. *Id.* at 718, 195 Cal. Rptr. at 328.

73. *Id.* at 732-33, 195 Cal. Rptr. at 338.

74. *Id.* at 727-33, 195 Cal. Rptr. 334-39.

75. *Id.* at 734, 195 Cal. Rptr. at 338.

76. *Id.* at 733, 195 Cal. Rptr. at 338.

77. *Id.* at 734, 195 Cal. Rptr. at 339.

78. *Id.*

the United States or any state.⁷⁹

3. Construction of unequal services

To sustain an Unruh Act challenge, in addition to showing that the plaintiff is a member of a protected class and that the defendant's establishment is a business, a plaintiff must prove that the defendant provided unequal services, facilities, advantages or privileges.⁸⁰ *Rolon v. Kulwitzky*⁸¹ illustrates how California courts view this equality provision as covering all aspects of services.⁸² *Rolon* involved two lesbians who went to a Los Angeles restaurant and requested to sit in one of the semi-private booths.⁸³ The hostess offered to serve them at another table, but refused to seat them in the requested booth due to the restaurant's policy of saving the seating in these booths for opposite sex couples only.⁸⁴

The plaintiff sought an injunction to prohibit the restaurant from continuing its discriminatory seating policy.⁸⁵ The trial court refused to grant the injunction.⁸⁶ The appellate court reversed on the ground that the restaurant's policy violated both the Unruh Act and a Los Angeles municipal ordinance.⁸⁷ The appellate court stated that it was "unable to conceive of any conduct that the restaurant could reasonably fear might offend the sensitivities of the most prudish patron."⁸⁸ Thus, under the Unruh Act, businesses must provide all aspects of their services without arbitrary discrimination.

The Supreme Court of California also addressed the issue of equal services in *Koire v. Metro Car Wash*.⁸⁹ In that case, the court held that several car washes and one night club violated the Unruh Act by offering promotional sex-based discounts to women.⁹⁰ The defendants had advertised promotions offering lower prices on certain days for women.⁹¹ The male plaintiff visited the establishments during the promotions and asked

79. *Id.* Because the charter mandates that the Boy Scouts' regulations not conflict with the laws of the United States or any state, the court held that this policy could not preempt the application of the Unruh Act. *Id.*; see 36 U.S.C. § 22 (1988).

80. See CAL. CIV. CODE § 51 (West Supp. 1991).

81. 153 Cal. App. 3d 288, 200 Cal. Rptr. 217 (1984).

82. See *id.* at 292, 200 Cal. Rptr. at 219.

83. *Id.* at 290, 200 Cal. Rptr. at 217.

84. *Id.* The restaurant's policy would have also excluded two heterosexual men or an opposite sex couple with a child from service in these booths. *Id.*

85. *Id.* at 292, 200 Cal. Rptr. at 219.

86. *Id.* at 291, 200 Cal. Rptr. at 218.

87. *Id.* at 291-93, 200 Cal. Rptr. at 218-19.

88. *Id.* at 292, 200 Cal. Rptr. at 219.

89. 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985).

90. *Id.* at 39, 707 P.2d at 204, 219 Cal. Rptr. at 142.

91. *Id.* at 27, 707 P.2d at 195, 219 Cal. Rptr. at 133.

to be charged the same discount prices as were offered to females.⁹² The court emphasized that the Unruh Act was not limited to barring exclusionary practices; it guarantees equal treatment of persons in all aspects of the services provided by a business.⁹³ The court found that differential pricing, based on sex, reinforces harmful stereotypes as well as violating the spirit of the Unruh Act.⁹⁴

III. ANALYSIS

A. *The Unruh Civil Rights Act Is Not Preempted by Federal Law*

To date, only one case has explored whether a state anti-discrimination law can be used to prohibit the military from interviewing on college campuses.⁹⁵ In 1986, the Third Circuit held in *United States v. City of Philadelphia*⁹⁶ that a municipal ordinance barring discrimination could not be used to prevent Temple University Law School from coordinating student interviews with the military.⁹⁷ The court held that the ordinance was preempted by federal law.⁹⁸ The court further held that state or local laws which bar universities from cooperating with military recruiters conflicted with the congressional policy of encouraging such cooperative efforts.⁹⁹

The ordinance reviewed in *City of Philadelphia* is similar to the Unruh Act because it prohibits limiting services offered to groups or individuals because of their sexual orientation.¹⁰⁰ In order for the Unruh Act to bar California universities from participating with military recruiters, therefore, the Act must avoid federal preemption.

92. *Id.*

93. *Id.* at 29, 707 P.2d at 197, 219 Cal. Rptr. at 135.

94. *Id.* at 34-35, 707 P.2d at 200-01, 219 Cal. Rptr. at 138-39.

95. See *United States v. City of Philadelphia*, 798 F.2d 81 (3d Cir. 1986).

96. 798 F.2d 81 (3d Cir. 1986).

97. *Id.* at 88-89. The court concluded that "the Order conflicts with a clearly discernible Congressional policy concerning military recruitment on the campuses of this nation's colleges and universities. It follows, then, that the Commission cannot enforce the Ordinance against Temple with respect to the latter's decision to make its placement facilities available to the J.A.G. Corps." *Id.*

98. *Id.* at 87. For a discussion of the court's reasoning, see *infra* notes 117-51 and accompanying text.

99. *City of Philadelphia*, 798 F.2d at 87.

100. The court found that it is unlawful for any employment agency to follow a policy which limits the employment opportunities of individuals or groups because of sexual orientation. *Id.* at 84 n.2 (citing section 9-1103(A)(2) of the Philadelphia Code). Temple University conceded that it acted as an employment agency as defined under the Code. *Id.* The Unruh Act has also been construed as prohibiting the provision of unequal services to persons based upon their sexual orientation. See *supra* notes 36-58 and accompanying text.

1. *United States v. City of Philadelphia*

In *City of Philadelphia*, two Temple University Law School students sought interviews with the Judge Advocate General Corps (J.A.G.), which represents the Army, Navy, Air Force and Marines.¹⁰¹ The Career Placement Center at Temple University Law School refused to schedule the students for interviews with the military.¹⁰² The students filed a complaint with the Philadelphia Human Relations Commission alleging that the law school had violated a city ordinance barring discrimination on the basis of sexual orientation.¹⁰³

The Philadelphia ordinance prohibited employment agencies from denying or limiting the employment opportunities of any individual or group based on sexual orientation.¹⁰⁴ The Human Relations Commission (the Commission), after finding that the placement services at Temple University Law School constituted an employment agency, held that the law school violated the ordinance by allowing the military to interview on campus.¹⁰⁵ The Commission ordered the law school to cease and desist from allowing the military to use its Career Placement Center.¹⁰⁶ The Commission found that by allowing the military to interview on campus, Temple University Law School had followed a policy that limited the employment opportunities of its gay and lesbian students.¹⁰⁷

The United States then filed a complaint in the district court alleging that the city ordinance violated the supremacy clause of the United States Constitution.¹⁰⁸ The district court granted summary judgment for the United States and Temple University on the grounds that the Commission's order attempted to do indirectly what it did not have the power to do directly.¹⁰⁹ In other words, the court interpreted the city's action as a plan to force the military to change its recruiting policy.¹¹⁰

On appeal, the Third Circuit held that the Philadelphia ordinance

101. *City of Philadelphia*, 798 F.2d at 83.

102. *Id.* at 84.

103. *Id.* Section 9-1103(A)(2) of the Philadelphia Code states in pertinent part that it shall be an unlawful employment practice "[f]or any . . . employment agency . . . to establish, announce or follow a policy of denying or limiting . . . the employment . . . opportunities, of any individual or group because of . . . sexual orientation." *Id.* at n.2 (citing section 9-1103(A)(2) of the Philadelphia Code).

104. *City of Philadelphia*, 798 F.2d at 84 n.4.

105. *Id.* at 84.

106. *Id.*

107. *Id.*

108. *Id.* at 84-85.

109. *Id.* at 85.

110. *Id.*

conflicted with a discernible congressional policy.¹¹¹ Congress had intended to promote cooperation between the Department of Defense and universities.¹¹² The court also found that the J.A.G.'s access to college recruiting programs was critical to its ability to conduct intensive recruiting campaigns.¹¹³ To support this interpretation of congressional intent, the court relied on a public law that states: " 'No part of the funds appropriated . . . for the Department of Defense . . . may be used at any institution of higher learning if . . . recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution.' " ¹¹⁴ The court found that this law had only one reasonable purpose: Congress considered access to college and university employment facilities by military recruiters to be a matter of paramount importance.¹¹⁵ Thus, the court found that Congress viewed such access as an integral part of the military's effort to conduct intensive recruiting campaigns to obtain enlistments.¹¹⁶

2. Analysis of the *City of Philadelphia* court's reasoning

a. *interpretation of congressional purpose*

Fundamentally, preemption is a question of congressional intent.¹¹⁷ Congress may easily preempt state law if it expresses such an intent.¹¹⁸ In *City of Philadelphia*, the circuit court found that Congress did not expressly preempt state law regarding employment discrimination.¹¹⁹ Instead, Congress expressly contemplated that states would exercise their traditional regulatory powers to prohibit employment discrimination.¹²⁰ The *City of Philadelphia* court, however, held that Congress exhibited the requisite intent required to preempt Philadelphia's human rights ordinance.¹²¹

In determining congressional intent, the court relied on its finding that Congress considered access to college and university employment

111. *Id.* at 87.

112. *Id.*

113. *Id.*

114. *Id.* at 86 (quoting Act of Sept. 26, 1972, Pub. L. No. 92-436, § 606(a), 88 Stat. 734, 740).

115. *Id.*

116. *Id.* at 86-87.

117. *English v. General Elec. Co.*, 110 S. Ct. 2270, 2275.

118. *See Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903, 919 (9th Cir. 1981), *aff'd sub nom. Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

119. *City of Philadelphia*, 798 F.2d at 86 n.5.

120. *Id.*

121. *Id.* at 88.

facilities by military recruiters to be a matter of *paramount importance*.¹²² The court rested this finding on two factors: (1) section 606(a) of the Department of Defense Authorization Act of 1973,¹²³ which cut off defense funds to schools which do not participate with military recruiting;¹²⁴ and, (2) the court's finding that military access to colleges and universities is integral to conducting intensive recruiting campaigns.¹²⁵

These two factors, however, do not support a finding of "paramount importance." First, section 606(a) fails to indicate that Congress viewed military recruiter access to college campuses as crucial. If Congress felt that this access were of paramount importance, it would have required all colleges and universities to accommodate military recruiters rather than singling out only secondary schools for mandatory cooperation with military recruitment programs.¹²⁶ The *City of Philadelphia* court relied upon the testimony of two military recruiters, who stated that on-campus recruiting was the most effective way to fill important positions.¹²⁷ Based primarily on their testimony, the court reasoned that Congress deemed military recruiter access to college campuses to be of paramount importance.¹²⁸ Thus, the court inferred that on-campus recruiting was of paramount importance because of its effectiveness.¹²⁹ If Congress actually felt that this access were of paramount importance, however, it would not have allowed universities to bar military recruiters from campus for any reason.¹³⁰ The only universities that cannot bar the military are those that desire to receive continued defense funding.¹³¹ Consequently, the underlying purpose of the law is not to require universities to allow the military to interview on campus, but rather to ensure that those

122. *Id.* at 86.

123. Act of Sept. 26, 1972, Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740.

124. *City of Philadelphia*, 798 F.2d at 86. Many universities receive money from the Department of Defense to fund educational and research programs. H.R. REP. NO. 1149, 92d Cong., 2d Sess. 80 (1972).

125. *City of Philadelphia*, 798 F.2d at 86.

126. *See id.*, 798 F.2d at 88 n.10; Act of Sept. 8, 1980, Pub. L. No. 96-342, § 302(d), 94 Stat. 1083, 1084 (1980) ("secondary educational institutions in the United States, the Commonwealth of Puerto Rico, and the territories of the United States should cooperate with the Armed Forces by allowing recruiting personnel access to such institutions" (emphasis added)).

127. *City of Philadelphia*, 798 F.2d at 87.

128. *Id.* at 86-87.

129. *Id.*

130. The law does not require universities to comply—it merely threatens to take away a part of their funding if they do not cooperate. Act of Sept. 26, 1972, § 606(a). If a college has the power to decide not to cooperate with the military, a decision that could be based on the military's discrimination against gays and lesbians, then clearly it is within the power of the state to do so.

131. *See* Act of Sept. 26, 1972, § 606(a).

institutions that receive defense funds allow the Department of Defense to use their recruiting services. The policy simply prohibits an institution from taking money from the Department of Defense while denying it access. Even if this law were intended to promote cooperation between the military and universities, it still only speaks as to those schools that receive defense funding.¹³²

In finding that Congress viewed military access to on-campus interviews as essential to an intensive recruiting campaign, the court in *City of Philadelphia* exaggerated an existing interest.¹³³ Congress has issued a directive instructing the branches of the military to conduct intensive recruiting campaigns to obtain enlistments.¹³⁴ This directive, however, speaks in general terms and does not define access to college campuses as an essential element of a recruiting campaign.¹³⁵ The court interpreted both the directive to recruit intensively, and Congress's policy of cutting defense funds to schools barring military recruiting as establishing Congress's view that military access to college recruiting services was of paramount importance.¹³⁶ Congress, however, does not cut defense funding at schools that discontinue their Reserve Officer Training Corps (ROTC) programs, which serve as a source of new Army officers.¹³⁷ If the underlying purpose of section 606(a) is to promote the military's intensive recruiting program, then the discontinuation of the ROTC at a university should also cause its defense funds to be cut.¹³⁸ Thus, the court's interpretation of the intent of section 606(a) is inconsistent with the plain language of the law.

132. See *id.* The focus of the legislation is on the appropriation of funds to universities. The law states that "[n]o part of the funds appropriated . . . for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if . . . [military recruiters] are being barred by the policy of such institution" *Id.* There is no language in the Act to support the *City of Philadelphia* court's interpretation that the law was meant to foster a cooperative atmosphere between the military and universities. See *City of Philadelphia*, 798 F.2d at 87.

Because the language only speaks to those institutions that receive defense funding, even under the *City of Philadelphia* standard, local or state laws should not be preempted if they are applied to universities not funded by the Department of Defense.

133. See *City of Philadelphia*, 798 F.2d at 86.

134. Act of Sept. 8, 1982, Pub. L. No. 97-252, § 1114(b)(1)(A), 96 Stat. 718, 749 (codified at 10 U.S.C. § 503(a) (1988)).

135. See 10 U.S.C. § 503(a) (1988). Compare Act of Sept. 8, 1980, Pub. L. No. 96-342, § 302(d), 94 Stat. 1083, 1084 (Congress mandated military access to secondary schools) with H.R. REP. NO. 1149, *supra* note 124, at 79-80 (stressing that universities have absolute right to determine whether to permit military recruiters on campus).

136. *City of Philadelphia*, 798 F.2d at 86.

137. See Act of Sept. 26, 1972, § 606(a).

138. See Kosova, *ROTC Ya Later*, NEW REPUBLIC, Feb. 19, 1990, at 24, 24 (Army relies on ROTC for more than 70 percent of new officers).

If the actual intent of the statute is to promote cooperation between universities and the military and to ensure the military's ability to recruit intensively, the law falls short of both of these goals. First, universities that do not receive any funds from the defense department probably do not have the financial incentive to cooperate with military recruiting. Moreover, this policy could induce universities not receiving defense funds to cancel their cooperation with the military in the hope of securing defense funding for the restoration of that cooperation. Second, intense recruiting takes place in ROTC programs;¹³⁹ these programs, however, are not within the scope of section 606(a).¹⁴⁰ If Congress thought that recruiting on college campuses was of paramount importance, then defense funding should also be cut from universities that cancel their ROTC programs.

Interpreting the purpose of section 606(a) more narrowly, however, avoids these inconsistencies. The congressional intent should be read as simply placing conditions upon a university's receipt of funds from the defense department. The focus of this interpretation is the appropriation of funds, thus, section 606(a) should affect only those schools that receive the funds. This interpretation would not induce schools that allow the military to interview without receiving funds to drop the programs in order to receive funding.¹⁴¹ This construction also avoids the second inconsistency. Under this narrower construction, the silence of section

139. *Id.*

140. See Act of Sept. 26, 1972, § 606(a).

141. This interpretation also allows for a reconciliation of two divergent statements in the House Report. "[The] national interest is best served by colleges and universities which provide for the full spectrum of opportunity for various career fields, including the military field through the Reserve Officers Training Corps program, and by the opportunity for students to talk to all recruiting sources, including military recruiters." H.R. REP. NO. 1149, *supra* note 124, at 79. While this statement seems to support the *City of Philadelphia* court's interpretation that the legislation was passed to encourage cooperation between universities and the military, it seems squarely refuted on the same page of the House Report. The report noted that each college and university retained the "absolute right to determine whether it desires to have any association with the military forces of its country, and this includes the right to determine whether it desires to permit military recruiters . . . on its campus." *Id.* at 79-80. If Congress's true purpose was to promote cooperation, the statement that a university has the *absolute* right to sever its association with the military undercuts that purpose.

When read together, however, these statements both support the narrower construction of congressional purpose. The statement concerning the national interest could reasonably be construed, not as the promotion of military and university cooperation, but rather as a justification for the conditioning of military funds upon the use of university placement services. When the purpose is simply to place a condition upon the granting of funds, the statement regarding the university's right to not associate with the military simply clarifies the university's obligations. Universities have no obligation to allow the military to interview on campus *unless* they would like to retain their defense funding. Act of Sept. 26, 1972, § 606(a).

606(a) upon the issue of the ROTC is logical. If Congress had merely intended to place a condition upon universities receiving defense funding, there was no need to deprive this funding from universities that cancel their ROTC programs.

A final factor to examine when determining congressional intent is the historical period in which the Congress enacted section 606(a). Section 606(a) was passed in 1972,¹⁴² near the close of the Vietnam conflict.¹⁴³ Students across the country conducted protests and tried to oust the military from their campuses.¹⁴⁴ Even if Congress intended to preempt state laws, the more important question is what types of state laws it intended to preempt.

The movement to expel the armed services in the early seventies grew from the anti-war movement,¹⁴⁵ not the military's exclusionary policies regarding homosexuals. Congressional notice, therefore, was probably brought to focus because of the anti-war protests.¹⁴⁶ There is a fundamental difference between kicking the military off campus because of anti-war sentiment and doing so because of discrimination. One rationale is based on disagreement with the military's war policy, while the other is based upon the state's strong interest in ending discrimination. When dealing with military operations and discipline, many courts will defer to the judgment of the military.¹⁴⁷ As the court in *City of Philadelphia* noted, however, states have traditionally maintained the power to regulate employment discrimination.¹⁴⁸ Thus, while courts may grant special deference to the military in the field of national security, the case for military preemption of state law weakens when the regulated fields have traditionally been regulated by the states.¹⁴⁹ Unruh Act claims are based on arbitrary discrimination—an area of law that has been directly

142. See Act of Sept. 26, 1972, § 606(a).

143. See R. LONG, *VIETNAM TEN YEARS AFTER* 7 (1986).

144. See COX COMM'N, *CRISIS AT COLUMBIA: REPORT OF THE FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY 1968*, at 63-75 (1968) (describing demonstrations against Reserve Officers Training Corps and Marine recruiters).

145. See *Campus Reform*, LIFE, May 30, 1969, at 42, 42 (arguing that student groups compelled examination of both ROTC's role on campus and classified governmental research projects at universities).

146. See COX COMM'N, *supra* note 144, at 63-75 (discussing Columbia University student protests ignited by military action in Vietnam); *Campus Reform*, *supra* note 145, at 42 (discussing nationwide protests on college campuses spurred by Vietnam conflict).

147. *North Dakota v. United States*, 110 S. Ct. 1986, 1999 (1990).

148. *City of Philadelphia*, 798 F.2d at 86 n.5.

149. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-27, at 499 (2d ed. 1988) (courts apply stricter standard for preemption when field in question has traditionally been regulated by states).

regulated by California since the late nineteenth century.¹⁵⁰ If the military is due less deference in any area, it should be here.¹⁵¹

b. standard to determine preemption

The *City of Philadelphia* court based its finding of federal preemption upon a standard that requires preemption of any state law that conflicts with a “‘discernible congressional policy.’”¹⁵² This standard for preemption originated in *Penn Dairies v. Milk Control Commission*,¹⁵³ a 1943 Supreme Court case. Though still good law, the standard relied on by the *City of Philadelphia* court was not invoked by the Supreme Court in two of its most recent decisions concerning federal preemption, rendering its current force as a relevant standard tenuous at best.¹⁵⁴

An important factor in preemption analysis is whether the area in question has been normally delegated to the state or to the federal government.¹⁵⁵ When the area has been traditionally regulated by the states, the court requires a clear and manifest purpose of Congress to preempt the state law.¹⁵⁶ When the area is of national concern, usually regulated by the federal government, the states have been accorded less deference.¹⁵⁷ Discrimination in employment is an area traditionally regulated by the states.¹⁵⁸ In two recent United States Supreme Court decisions on preemption in areas of traditional state regulation, the Court did not utilize the “discernible congressional purpose” standard set forth in *City of Philadelphia*.¹⁵⁹

In *North Dakota v. United States*,¹⁶⁰ the dispute centered around a

150. See *supra* notes 14-34 and accompanying text.

151. See Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 202 (1962) (contending that courts should defer to military less when protecting civil rights).

152. *City of Philadelphia*, 798 F.2d at 87 (quoting *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 271 (1943)).

153. 318 U.S. 261 (1943). The Court stated that the question was “whether the state’s regulation . . . in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy.” *Id.* at 271.

154. See *English v. General Elec. Co.*, 110 S. Ct. 2270, 2277 (1990) (Energy Reorganization Act of 1974 did not preempt plaintiff’s state law tort action); *North Dakota*, 110 S. Ct. at 1994 (state’s liquor reporting and labeling regulations were applicable to in-state military base and were not preempted by federal law).

155. L. TRIBE, *supra* note 149, § 6-27, at 499-500.

156. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

157. See *North Dakota*, 110 S. Ct. at 1992 (state may not regulate use of alcohol in federal enclave, but within area of its jurisdiction, it has virtually complete control).

158. *City of Philadelphia*, 798 F.2d at 86 n.5. The court noted that in this instance, state or local laws dealing with employment discrimination are only preempted if they conflict with federal law. *Id.*

159. See *English*, 110 S. Ct. at 2275; *North Dakota*, 110 S. Ct. at 1994.

160. 110 S. Ct. 1986 (1990).

North Dakota statute that required persons buying liquor from out-of-state wholesalers to comply with reporting and labeling regulations.¹⁶¹ These regulations increased the military's cost of buying alcohol from out-of-state suppliers.¹⁶² Congress, however, had passed legislation requiring the military to obtain the most advantageous commercial contracts.¹⁶³ The federal government argued that this law preempted the state liquor regulations.¹⁶⁴ The Court, however, used a two-pronged test to determine that the state law was not preempted: (1) the law did not regulate the federal government directly or discriminate against it; and, (2) the law did not conflict with an affirmative command of Congress.¹⁶⁵

In contrast, if the *North Dakota* Court had invoked the *City of Philadelphia*'s "discernible congressional policy" test, it may have arrived at a different result. Congress clearly expressed a policy favoring military acquisition of supplies as inexpensively as possible.¹⁶⁶ The discernible policy was to help cut the costs of the military.¹⁶⁷ Nevertheless, the Court held that the state requirements in this case were merely an indirect burden, only "regulat[ing] federal activity in the sense that they [made] it more costly for the [g]overnment to do its business."¹⁶⁸

The Supreme Court also bypassed the "discernible congressional policy" test in *English v. General Electric Co.*¹⁶⁹ In *English*, a whistleblowing employee in a nuclear fuel production facility was fired for violating a provision of the Energy Reorganization Act of 1974.¹⁷⁰ The Court held that the Energy Reorganization Act of 1974 did not preempt a state-law claim for intentional infliction of emotional distress.¹⁷¹ The Court noted that congressional intent to preempt must be either express

161. *Id.* at 1991.

162. *Id.*

163. See 10 U.S.C. § 2488(a) (1988) (military to procure liquor from most competitive source).

164. *North Dakota*, 110 S. Ct. at 1990.

165. *Id.* at 1994.

166. *Id.* at 1990; see 10 U.S.C. § 2488(a).

167. See 10 U.S.C. § 2488(a).

168. *North Dakota*, 110 S. Ct. at 1994-95. A state ban on military recruiting on campus would not prohibit the military from recruiting intensively. For example, the military could use other avenues to reach college students. The military could advertise in campus newspapers and interview interested students in hotels near campus. Recruiting without the assistance of Career Placement Centers, thus, would be an indirect burden in that it would merely increase the military's costs.

169. 110 S. Ct. 2270 (1990).

170. *Id.* at 2273; 42 U.S.C. §§ 5801-5891 (1988). The Energy Reorganization Act makes it unlawful for an employer to discharge an employee, in retaliation for making complaints about nuclear safety. Energy Reorganization Act of 1974, § 210(a), 42 U.S.C. § 5851(a) (1988).

171. *English*, 110 S. Ct. at 2280.

or plainly implied in order to negate state causes of action.¹⁷² The Court stated that the threshold for preemption of a state cause of action is the "clear and manifest intention" of Congress.¹⁷³ Even though allowing state claims would decrease the incentive to report immediately hazardous conditions, the Court found that Congress had not evidenced sufficient intent to preclude the state cause of action.¹⁷⁴ In addition, the Court was reluctant to imply preemption absent actual conflict.¹⁷⁵

In *City of Philadelphia*, the circuit court conceded that employment discrimination falls within the traditional regulatory powers of the state.¹⁷⁶ It also acknowledged that when dealing with state statutes regulating their internal affairs, preemption is not to be lightly inferred.¹⁷⁷ The court, however, applied the wrong standard when it concluded that a discernible congressional purpose could be found if Congress reasonably intended to preempt state law.¹⁷⁸ The Supreme Court has described a more stringent test when the area to be preempted has been traditionally regulated by the states: the intent to supersede state law must be "clear and manifest."¹⁷⁹

c. application of the "clear and manifest" standard

The court in *City of Philadelphia* erred when it ruled that the Philadelphia Human Rights Ordinance was preempted by federal law because it interfered with a discernible congressional policy.¹⁸⁰ The area in question has been traditionally regulated by the states; therefore, a court should not find the state law preempted unless the law directly conflicts with a federal statute or it is the "clear and manifest" purpose of Congress to preserve the area for federal regulation.¹⁸¹ Section 606(a), however, is the only federal regulation in this area and is not sufficiently comprehensive to occupy the entire field.¹⁸² Congress has expressly rec-

172. *Id.* at 2275 n.5.

173. *Id.* at 2279.

174. *Id.* at 2280-81.

175. *Id.* at 2281. Similarly, in an Unruh Act claim, there would be no actual conflict since complying with the state law would not require a university to violate federal law. See Act of Sept. 26, 1972, § 606(a) (university can comply with both state and federal law by denying access to military recruiters and refusing defense department funding).

176. *City of Philadelphia*, 798 F.2d at 86 n.5.

177. *Id.* at 86.

178. *Id.*

179. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

180. See *City of Philadelphia*, 798 F.2d at 87.

181. *Rice*, 331 U.S. at 230.

182. See *id.* The *Rice* Court found there were three instances where a "clear and manifest" intent to preempt state law would be present. First, Congress could legislate extensively in the

ognized that universities and colleges have the absolute right to keep the military from interviewing on their campuses—a right that can be invoked for any reason whatsoever.¹⁸³ According to this policy, universities can exclude military recruiters from campuses for good reasons, bad reason, or no reason at all.¹⁸⁴ Under the *City of Philadelphia* standard, however, a state may not bar military access to universities within its borders.¹⁸⁵ This would hold true even where the state has a legitimate interest in prohibiting military on-campus recruiting.¹⁸⁶ Even if Congress's actual purpose in passing section 606(a) was to encourage cooperation between the military and universities,¹⁸⁷ the legislative history lacks sufficient clarity to pass the "clear and manifest" standard.

Under the *City of Philadelphia* standard, the University of California could exercise its absolute right to bar the military recruiters from campus for any reason at all.¹⁸⁸ Federal preemption of state law, however, would bar California from excluding military on-campus recruiting—even to pursue a compelling state interest or public policy. Following this analysis results in the University of California, an institution created by the state,¹⁸⁹ possessing greater power than the state. To avoid this incongruous result, California courts should not use the relaxed preemption standard set forth in *City of Philadelphia*.

field, leaving no room for state regulations. *Id.* Second, the standard would be met if the area were a field of dominant federal interest. *Id.* Third, the state law would be preempted if it were inconsistent with the objective behind the federal statute. *Id.*

Only the third reason could arguably favor preemption in the context of this issue. If the federal objective were to coerce universities into cooperating with military recruiters, then state anti-discrimination statutes barring this cooperation would be inconsistent with the federal objective. This objective, however, was not expressed by Congress. If this were the objective, the law would contain some fundamental inconsistencies. See *supra* notes 133-51 and accompanying text for a discussion of these inconsistencies. By interpreting section 606(a) as having the narrower objective of conditioning defense funding, a court would not only avoid these inconsistencies, but would also find that the state law is not preempted. By barring universities from assisting military recruiters, a state would not interfere with any congressional objective. The Department of Defense would simply cease funding those universities that could not aid in military recruiting. In addition, the law contains a provision allowing the Department of Defense to continue funding those universities that do not allow military recruiting if the university is conducting important research for national security. See Act of Sept. 26, 1972, Pub. L. No. 92-436, § 606(a), 86 Stat. 740.

183. See H.R. REP. NO. 1149, *supra* note 124, at 79-80.

184. See *id.*

185. *City of Philadelphia*, 798 F.2d at 88-89.

186. See *id.* at 89.

187. See *id.* at 86.

188. H.R. REP. NO. 1149, *supra* note 124, at 79-80.

189. See CAL. CONST. art. IX, § 9.

B. The Broad Interpretation of the Unruh Act

Plaintiffs successfully bypassing a preemption defense must then argue that universities' actions violate the Unruh Act. As the preceding background section illustrates, California courts have read the different clauses of the Unruh Act broadly.¹⁹⁰ The classes expressly protected by the Unruh Act have been construed to be an illustrative rather than restrictive list.¹⁹¹ Thus, although gays and lesbians are not expressly mentioned in the Unruh Act, courts have held that they constitute a protected class.¹⁹² Courts have also regarded the Unruh Act as a reflection of California's strong interest in abolishing all kinds of arbitrary discrimination.¹⁹³ In addition, the courts have not hesitated to construe the phrase "all business establishments of every kind whatsoever"¹⁹⁴ as broadly as possible.¹⁹⁵ Both profit and non-profit businesses and organizations have been required to comply with the provisions of the Unruh Act. Finally, one California court has held that differences in only one aspect of a service, otherwise equally provided, violate the language and spirit of the Unruh Act.¹⁹⁶

C. Universities Violate the Unruh Civil Rights Act by Allowing the Military to Participate in On-Campus Interview Programs

A successful plaintiff asserting an Unruh Act violation must fall within a class protected under the Unruh Act.¹⁹⁷ In addition, the plaintiff must show: (1) the defendant is a business establishment,¹⁹⁸ and (2)

190. See *supra* notes 14-94 and accompanying text.

191. *In re Cox*, 3 Cal. 3d 205, 212, 474 P.2d 992, 995, 90 Cal. Rptr. 24, 27 (1971).

192. See, e.g., *Stoumen v. Reilly*, 37 Cal. 2d 713, 717, 234 P.2d 969, 972 (1951); *Hubert v. Williams*, 133 Cal. App. Supp. 1, 5, 184 Cal. Rptr. 161, 163 (1982).

193. E.g., *Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 86, 707 P.2d 212, 221, 219 Cal. Rptr. 150, 159 (1985); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 147 Cal. App. 3d 712, 733, 195 Cal. Rptr. 325, 334 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

194. CAL. CIV. CODE § 51 (West Supp. 1991).

195. See, e.g., *Isbister*, 40 Cal. 3d at 84, 707 P.2d at 219, 219 Cal. Rptr. at 157 (Boys' Club violated Unruh Act by excluding girls); *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 795, 662 P.2d 427, 430, 191 Cal. Rptr. 320, 323 (1983) (condominium owners association was business and violated Unruh Act by prohibiting residency to minors); *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 731, 640 P.2d 115, 121, 180 Cal. Rptr. 496, 502 (apartment complex violated Unruh Act by excluding families with children from renting), *cert. denied*, 459 U.S. 858 (1982); *Cox*, 3 Cal. 3d at 211, 474 P.2d at 995, 90 Cal. Rptr. at 27 (shopping center prohibited from arbitrarily excluding patron based on appearance).

196. See *Rolon v. Kulwitzky*, 153 Cal. App. 3d 288, 291, 200 Cal. Rptr. 217, 218 (1984).

197. See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 147 Cal. App. 3d 712, 733, 195 Cal. Rptr. 325, 338 (1983), *appeal dismissed*, 468 U.S. 1205 (1984). Gays and lesbians are a protected class under the Act. See *supra* notes 36-58 and accompanying text.

198. *Curran*, 147 Cal. App. 3d at 717, 195 Cal. Rptr. at 328.

the defendant has arbitrarily discriminated against the plaintiff.¹⁹⁹

1. Universities are business establishments under the Unruh Act

The Unruh Act applies to "all business establishments of every kind whatsoever,"²⁰⁰ except for strictly private clubs or institutions.²⁰¹

In *Sullivan v. Vallejo City Unified School District*,²⁰² a California appellate court stated it was reasonably certain that a public school would fall within the scope of the Unruh Act.²⁰³ In *Sullivan*, the defendant high school refused to allow a disabled student to bring her service dog to school.²⁰⁴ The district court granted the defendant's motion for summary judgment, stating that a high school was not a business establishment.²⁰⁵ The appellate court, however, reversed and found that a public school would most likely be considered a business establishment under the Unruh Act.²⁰⁶ The court rested its conclusion primarily on two California Supreme Court cases, *Isbister v. Boys' Club of Santa Cruz*²⁰⁷ and *Marina Point, Ltd. v. Wolfson*.²⁰⁸

In *Isbister*, the court broadly construed what types of business establishments were subject to the Unruh Act.²⁰⁹ The court held that a non-profit Boys' Club, that stood to lose substantial funding if girls were admitted, was nevertheless subject to the Unruh Act.²¹⁰ Because the legislature drafted no exemptions into the Unruh Act, the *Isbister* court was reluctant to imply any, reasoning that the legislature knew how to draft such exceptions when it wanted them.²¹¹

199. *Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 86, 707 P.2d 212, 221, 219 Cal. Rptr. 150, 159 (1985).

200. CAL. CIV. CODE § 51 (West Supp. 1991).

201. *Curran*, 147 Cal. App. 3d at 730-31, 195 Cal. Rptr. at 336. The court found that "those with a common interest may associate exclusively with whom they please *only* if it is the kind of association which was intended to be embraced within the protection afforded by the rights of privacy and free association." *Id.* at 730, 195 Cal. Rptr. at 336. The argument asserting that private clubs should be excluded from the coverage of the Act relies on individuals' constitutional right to freely associate. *Id.* The court, however, found that an organization with no standards for admissibility and a large membership is simply too unselective to be a private club. *Id.* at 731, 195 Cal. Rptr. at 336.

202. 731 F. Supp. 947 (E.D. Cal. 1990).

203. *Id.* at 952.

204. *Id.* at 949.

205. *Id.* at 952.

206. *Id.*

207. 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

208. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 196, *cert. denied*, 459 U.S. 858 (1982).

209. *Isbister*, 40 Cal. 3d at 76, 707 P.2d at 214, 219 Cal. Rptr. at 152. See *supra* notes 61-69 and accompanying text for a discussion of *Isbister*.

210. *Isbister*, 40 Cal. 3d at 90, 707 P.2d at 224, 219 Cal. Rptr. at 162.

211. *Id.* at 84, 707 P.2d at 219, 219 Cal. Rptr. at 157.

In *Marina Point*, the court examined the legislative history of the Unruh Act. The Court looked to an earlier provision of the bill which enumerated groups covered by the Unruh Act; this list had included schools.²¹² Instead of using this earlier version of the act, the legislature adopted the language "all business establishments of any kind whatsoever."²¹³ The court construed the Unruh Act, as enacted, as covering all of the categories listed in the original proposed legislation, in addition to categories not mentioned previously.²¹⁴

On this basis, the appellate court in *Sullivan*, after examining the state law, reasoned that a university should be bound by the provisions of the Unruh Act.²¹⁵ One commentator has asserted that although universities are non-profit for tax purposes, their operation is most similar to that of private businesses.²¹⁶ Universities' business-like attributes include managing investment funds, collective bargaining, securing land and building permits, and satisfying ongoing business debts.²¹⁷ If a Boys' Club charging a nominal fee,²¹⁸ and a non-profit home-owners' association²¹⁹ are considered businesses under the Unruh Act, a university that has invested millions of dollars and employed a large staff, would definitely constitute a business establishment.²²⁰

2. Universities arbitrarily discriminate by providing unequal services to gay and lesbian students

Career Placement Centers provide a service to students—linking them to employment opportunities in the private and public sectors.²²¹ Career Placement Centers also provide a centralized location containing information to help students maximize their efficiency in job hunting²²²

212. *Marina Point*, 30 Cal. 3d at 732, 640 P.2d at 122, 180 Cal. Rptr. at 503.

213. See CAL. CIV. CODE § 51 (West Supp. 1991).

214. *Marina Point*, 30 Cal. 3d at 732, 640 P.2d at 122, 180 Cal. Rptr. at 503.

215. See *Sullivan*, 731 F. Supp. at 952.

216. Comment, *Divestiture Resolutions: University Director Liability Under the Emerging Corporate Standard*, 15 U.S.F. L. REV. 261, 279-80 (1980); see also J. O'NEILL & S. BARNETT, COLLEGES AND CORPORATE CHANGE: MERGER, BANKRUPTCY AND CLOSURE 2 (1980) (listing similarities between operations of corporations and universities).

217. Comment, *supra* note 216, at 279-80.

218. See *Isbister*, 40 Cal. 3d at 76, 707 P.2d at 214, 219 Cal. Rptr. at 152.

219. See *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 796, 662 P.2d 427, 431, 191 Cal. Rptr. 320, 324 (1983).

220. *Sullivan*, 731 F. Supp. at 952.

221. GOLDEN GATE UNIV., *supra* note 1, at 42; STANFORD UNIV., *supra* note 2, at 47; UNIVERSITY OF CAL., LOS ANGELES, *supra* note 1, at 39.

222. See GOLDEN GATE UNIV., *supra* note 1, at 42; LOYOLA MARYMOUNT UNIV., *supra* note 2, at 43; STANFORD UNIV., *supra* note 2, at 47.

and to facilitate their access to employers.²²³ Moreover, Career Placement Centers provide a service to employers by helping them fulfill their hiring needs.²²⁴

Although not specifically mentioned in the Unruh Act, universities and their Career Placement Centers should be subject to its provisions. Given the important role of educational institutions in our society²²⁵ and the large number of persons who avail themselves of the opportunity to go to college,²²⁶ California's public policy of eliminating arbitrary discrimination from community life would be greatly hindered if universities were exempt from the Unruh Act's provisions.

In addition to the business establishment requirement, successful plaintiffs must also show that they were offered unequal services.²²⁷ If a plaintiff cannot establish that universities arbitrarily discriminate by providing unequal services, the Unruh Act will not apply. Universities may raise three arguments to support the contentions that they do not provide services unequally or arbitrarily discriminate. This Comment will discuss them in turn.

a. argument 1: universities provide equal services because they arrange interviews between military recruiters and homosexual students

Universities may argue that they provide equal services to gay and lesbian students if they arrange interviews for them with the military.²²⁸ This practice allows both heterosexual and homosexual students to have the same number of interviews with the same employers. While this appears to satisfy quantitative equality, the quality of the interviews is unequal.²²⁹ The service offered by Career Placement Centers is to assist

223. See *GOLDEN GATE UNIV.*, *supra* note 1, at 42; *LOYOLA MARYMOUNT UNIV.*, *supra* note 2, at 43; *STANFORD UNIV.*, *supra* note 2, at 47; *UNIVERSITY OF CAL., DAVIS*, *supra* note 2, at 20; *UNIVERSITY OF CAL., LOS ANGELES*, *supra* note 1, at 39.

224. *Adams, Yale Placement Center Ups Ante for Firm Interviews on Campus*, Nat'l L.J., Sept. 28, 1987, at 4, col. 5.

225. See *AMERICAN EDUCATION* 4-9 (R. Long ed. 1984).

226. See *CALIFORNIA COMMUNITY COLLEGE BOARD OF GOVERNORS, STATS AND FACTS: THE CALIFORNIA COMMUNITY COLLEGES 2* (1983) (enrollment in community colleges quadrupled between 1960 and 1983 reaching over 1,000,000 students enrolled per year); *THE CALIFORNIA STATE UNIVERSITY AND COLLEGES 3* (1983) (over 315,000 total students enrolled in the 19 campus system).

227. See *Isbister*, 40 Cal. 3d at 86, 707 P.2d at 221, 219 Cal. Rptr. at 159.

228. See *United States v. City of Philadelphia*, 798 F.2d 81, 89 n.11 (3d Cir. 1986).

229. *Cf. Rolon v. Kulwitzky*, 153 Cal. App. 3d 288, 200 Cal. Rptr. 217 (1984) (restaurant found to have violated Unruh Act for refusing to sit lesbian couple in booth reserved for heterosexual couples); *Suttles v. Hollywood Turf Club*, 45 Cal. App. 2d 283, 114 P.2d 27 (1941) (racetrack violated public accommodations statute by not allowing blacks in club house).

students in securing employment.²³⁰ If universities know that open homosexuals will be denied the opportunity of employment with the military, regardless of their qualifications, the service offered will be illusory. The purpose of Career Placement Centers is to provide access to job opportunities, not just to provide interviews.²³¹ Career Placement Centers that allow the military to interview on campus are not, therefore, providing homosexual students equal access to job opportunities. By allowing military participation in on-campus recruiting, universities effectively deny approximately ten percent²³² of the students who fund the Career Placement Centers an opportunity made available to other students.

b. argument 2: universities do not discriminate, the military discriminates

Universities may concede that homosexuals are discriminated against, but they will allege that it is only the military that discriminates. Universities may argue that they should not be held liable for those actions taken by the military that contradict the purposes of the Unruh Act. Presently, there is no case law on whether liability may be imputed to third parties under the Unruh Act. Courts, however, have construed civil rights statutes as allowing imputed liability.²³³

Under federal civil rights statutes,²³⁴ courts have imputed liability in

even though blacks were allowed in all other seating areas). In *Rolon*, the restaurant did not refuse to serve the lesbian couple. *Id.* It merely refused to seat them in a particular booth. *Id.* Had the couple agreed to sit at another table, the restaurant would have served them from the same menu and at the same prices as all of its other customers. Essentially it would have treated them equally. *Id.* The policy which excluded lesbian couples from certain booths, even though they were entitled to all other services offered by the restaurant, violated the Unruh Act's requirement of equal provision of services. *Id.*

The above cases are examples of how even indirect discrepancies in service are prohibited under the Unruh Act. Like the restaurant in *Rolon*, universities offer most of the same services to their heterosexual and homosexual students, even with respect to the military. Universities have held themselves out as providing Career Placement Centers to assist all students in securing employment. *See supra* note 223. When universities set up interviews between homosexual students and the military, they do not assist these students in securing employment.

230. UNIVERSITY OF CAL., DAVIS, *supra* note 2, at 20.

231. *See supra* note 223.

232. *See* R. ISAY, BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT 14 (1989) (about ten percent of population between ages of sixteen and sixty-five is estimated to have been exclusively homosexual for at least three-year period).

233. *See* Monell v. Department of Social Services of New York, 436 U.S. 658, 690-91 (1978); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 725 (3d Cir. 1989); Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir. 1989); Phiffer v. Proud Parrot Motor Hotel, 648 F.2d 548, 552 (9th Cir. 1980).

234. 42 U.S.C. §§ 1982-1983 (1988). Section 1982 reads in pertinent part: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

a variety of situations.²³⁵ This type of liability, however, may not be imputed solely on the basis of *respondeat superior*.²³⁶ To impute liability, some element of cause must be attributable to the defendant.²³⁷ The relevant question is whether universities have in any way caused the discrimination against gay and lesbian students.

Cause sufficient to impute liability has been found in a number of situations. In *Stoneking v. Bradford Area School District*,²³⁸ the plaintiff filed a sexual harassment claim against a teacher²³⁹ pursuant to 42 U.S.C. § 1983.²⁴⁰ The federal appellate court allowed the plaintiff to join members of the school board as defendants.²⁴¹ The court found that the school board could be held liable for adopting and maintaining a policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers.²⁴² The court held that the plaintiff established causation by showing that the school officials encouraged a climate to flourish where violations of the statute occurred.²⁴³

In *Bordanaro v. McLeod*,²⁴⁴ the plaintiffs were brutally beaten by Everett, Massachusetts police officers.²⁴⁵ Police officers broke down the door of a motel room and beat the occupants until one died; the others were unconscious.²⁴⁶ The plaintiffs brought suit against the city of Ever-

Id. § 1982. Section 1983 provides that any person who, under color of any custom or usage of any state or territory "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable. . . ." *Id.* § 1983.

235. See *infra* notes 238-59 and accompanying text.

236. *Monell*, 436 U.S. at 491. The language of section 1983 should not be construed to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A's Tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend [section] 1983 liability to attach where such causation was absent.

Monell, 436 U.S. at 492.

237. *Id.*

238. 882 F.2d 720 (3d Cir. 1988).

239. *Id.* at 722.

240. 42 U.S.C. § 1983.

241. *Stoneking*, 882 F.2d at 722.

242. *Id.* at 724-25.

243. *Id.* at 730. Sufficient causation was established to deny defendants' motion to dismiss where defendants' actions could be construed by a jury as "encourag[ing] a climate to flourish where innocent girls are victimized." *Id.* (citation omitted). In reaching this conclusion, the court relied on the testimony of another student who had complained of sexual harassment and who had been told not to tell her parents. *Id.* at 727. In addition, no notes were made in the files of teachers who had been accused by students of sexual misconduct. *Id.*

244. 871 F.2d 1151 (1st Cir. 1989).

245. *Id.* at 1154.

246. *Id.* at 1153-54. The incident occurred when an off-duty police officer got into a fight at a bar. After losing the fight, he called for police reinforcements. When the police returned

ett, the Mayor and the Chief of Police under section 1983.²⁴⁷ The practice of breaking down doors without a warrant had become so widespread and flagrant that the Chief of Police and the Mayor were found to have had constructive knowledge of the violations.²⁴⁸ Causation was satisfied in this case by proving that the Chief of Police had constructive knowledge of civil rights violations²⁴⁹ and that the violations were a moving force behind the plaintiff's injury.²⁵⁰

Liability for the racial discrimination of an employee was extended to the employer in *Phiffer v. Proud Parrot Motor Hotel*.²⁵¹ The plaintiff, a black man, was denied office space on the grounds that there were no vacancies.²⁵² White friends of the plaintiff, however, were shown a vacant office when they went to the establishment the next day.²⁵³ The plaintiff brought an action pursuant to 42 U.S.C. § 1982.²⁵⁴ The defendant argued that the desk clerk who misled the plaintiff may have discriminated, but her discrimination could not be imputed to the owner.²⁵⁵ The court found that discriminatory conduct on the part of a rental agent is attributable to the owner of a motel, apartment complex or other public housing facility.²⁵⁶

Under these standards, a successful plaintiff must show that: (1) the defendant had constructive knowledge of the violations; (2) the defendant encouraged a climate where violations of the statute would occur; and, (3) the violations were a moving force behind the plaintiff's injury. First, universities could be shown to have constructive knowledge of these Unruh Act violations due to the publicized nature of this issue. Alternatively, students could put universities on actual notice by filing formal complaints. Second, in allowing the military to interview on campus, universities do not simply fail to act; rather, they invite the military on campus and provide them with services.²⁵⁷ By inviting the military

wielding night sticks, clubs, bats and tire irons, the plaintiffs fled into the nearby motel room where the beatings occurred. *Id.*

247. *Id.* at 1154.

248. *Id.* at 1157.

249. *Id.*

250. *Id.* at 1158. The court found it reasonable for a jury to conclude that there was supervisory encouragement, condonation and even acquiescence in the unconstitutional practice. *Id.* at 1157.

251. 648 F.2d 548 (9th Cir. 1980).

252. *Id.* at 550.

253. *Id.*

254. 42 U.S.C. § 1982. This statute makes it illegal to deny rights in the leasing, purchase or sale of property on the basis of race. *Id.*

255. *Phiffer*, 648 F.2d at 551.

256. *Id.* at 552.

257. See Adams, *supra* note 224, at 4.

onto their campuses, universities support and encourage a climate where the right of gays and lesbians to be free from discrimination is violated.²⁵⁸ Third, universities' utilization of the military in their placement services causes the violation of gay and lesbian students' right to full and equal services. This causal link is highlighted by universities' absolute right to expel the military from their recruiting programs.²⁵⁹ Under these standards, universities violate the Unruh Act and, therefore, should be held liable.

c. argument 3: the military's discrimination is legal; therefore, liability can not be imputed to universities

Universities may argue that the cases discussed in the previous section are inapposite because the military, unlike the primary actors in those cases, does not violate the law. Universities might posit two distinct reasons why the Unruh Act should not bar the military from discriminating against homosexuals. First, universities may argue that the military does not *arbitrarily* discriminate against gays and lesbians.²⁶⁰ Second, universities may contend that the military is not bound by state anti-discrimination laws. Thus, universities may claim that the military's protection from the Unruh Act extends to shield universities from liability.

Extension of the military's immunity from state law, however, is not warranted. The first prong of the universities' argument, asserting that no arbitrary discrimination occurs, does not take into account that universities themselves provide unequal services.²⁶¹ Although the military has allegedly provided a reasonable basis for its discrimination,²⁶² universities would still be required to show that they also had rational reasons to offer unequal services.²⁶³

258. See *Isbister*, 40 Cal. 3d at 75-76, 707 P.2d at 214, 219 Cal. Rptr. at 151-52; *supra* notes 221-27.

259. H.R. REP. NO. 1149, *supra* note 124, at 79-80 (1972).

260. A defendant may escape liability by showing that the inequality of service was based on a reasonable regulation. See *Marina Point*, 30 Cal. 3d at 737, 640 P.2d at 125, 180 Cal. Rptr. at 506; *In re Cox*, 3 Cal. 3d 205, 217, 474 P.2d 992, 1000, 90 Cal. Rptr. 24, 32 (1970). The military's anti-homosexual regulations have been held to be sufficiently rational to pass equal protection analysis. See, e.g., *Pruitt v. Weinberger*, 659 F. Supp. 625, 627 (C.D. Cal. 1987). Universities may argue that the military's policy, therefore, is not arbitrary as defined by the Unruh Act.

261. See *supra* notes 221-27 and accompanying text.

262. See *supra* note 5; see also 32 C.F.R. pt. 41 app. A, pt. 1(H)(1)(a) (1990) (Defense Department's statement that homosexuality is incompatible with military service).

263. See *Marina Point*, 30 Cal. 3d at 737, 640 P.2d at 125, 180 Cal. Rptr. at 506 (landlord's showing that children are more boisterous than adults was not rationally related to exclusion of families with children from apartment complex); *Cox*, 3 Cal. 3d at 217, 474 P.2d at 100, 90

Universities could argue that they want to provide every possible job opportunity to their students. Coupled with this concern is the fact that the military's discrimination is legal.²⁶⁴ Universities could contend, therefore, that allowing recruiting by a legally discriminating employer, for the legitimate concern of providing students with job opportunities, does not constitute arbitrary discrimination. This argument focuses on the importance of the job placement services that are being offered unequally.²⁶⁵ In essence, this argument asserts that heterosexual students' interest in obtaining military job placement outweighs homosexual students' right to the provision of equal services. Under this type of balancing test, important services offered to the majority require less justification for their unequal provision. Arbitrary discrimination, however, does not focus on the importance of services provided to an enfranchised group, but rather on the reasons for the disparate treatment.²⁶⁶ Unlike the military, which has been found to have an over-

Cal. Rptr. at 32 (asking patron to leave shopping mall because of his unconventional dress was not reasonable regulation rationally related to services performed). See *supra* notes 221-27 for a discussion of why universities that allow the military to interview on-campus independently provide unequal services.

264. See *supra* note 5.

265. Barring the military from on-campus recruiting does not deny heterosexual students the opportunity to work for the military. Students are not foreclosed from initiating contact with the military for employment purposes. Also, the military may actively reach interested students through avenues other than Career Placement Centers.

266. Courts holding that discriminatory rules or regulations were reasonable under the Unruh Act have rested their decisions on one of two factors. First, a regulation may stand if the purposes underlying the disparate treatment is based on a particular and specialized need. See, e.g., *Marina Point*, 30 Cal. 3d at 742-43, 640 P.2d at 129, 180 Cal. Rptr. at 510 (age qualifications in housing development specifically designed to provide for specialized needs of older people are reasonable); *Ross v. Forest Lawn Memorial Park*, 153 Cal. App. 3d 988, 993, 203 Cal. Rptr. 468, 471 (1984) (policy permitting private funerals by which punk rockers were excluded from memorial service at deceased's parents' request was reasonable in light of specialized nature of service). Second, courts may allow disparities in treatment when the unequal services do not perpetuate irrational stereotypes and promote a socially desirable goal. See, e.g., *Starkman v. Mann Theaters Corp.*, 227 Cal. App. 3d 1491, 1497-98, 278 Cal. Rptr. 543, 547 (1991); *Koire v. Metro Carwash*, 40 Cal. 3d 24, 34-35, 707 P.2d 195, 201, 219 Cal. Rptr. 133, 139 (1985).

Career Placement Centers provide their services to all students. Although heterosexual students may benefit from on-campus military recruiting, denial of job opportunities to homosexual students is not justified by an overriding specialized need of heterosexual students. Furthermore, the job placement services are neither intimate nor specialized in that equal provision of services to homosexual students would infringe upon a sensitive right of heterosexual students. Exclusion of gays and lesbians from full and equal participation in Career Placement services also promotes the irrational stereotype that they are not deserving of the same opportunities as heterosexual students. The policy of allowing the military to interview on campus, therefore, would not be a reasonable regulation under the Unruh Act.

riding national security interest,²⁶⁷ California universities have no legitimate reason to distinguish between heterosexual and homosexual students in the provision of services.²⁶⁸

The second prong of the universities' argument asserts that because the military policy has been sustained by the courts,²⁶⁹ there is no liability to be imputed to the universities, which merely aid in legal discrimination. This argument, however, fails to examine the underpinnings of why the military is exempt from the Unruh Act. It is not because California condones discrimination based on sexual orientation, but rather because the military is shielded by the preemption principle.²⁷⁰ California universities do not enjoy this same protection and, therefore, they should be bound by state law.²⁷¹

The legality of the military's discrimination does not necessitate a finding that universities cannot be liable. The California Attorney General found that universities that were sufficiently connected to fraternities that discriminated on the basis of race, could be held liable for civil rights violations despite the fact that fraternities were shielded from such liability.²⁷² Although the fraternities' discrimination was lawful, universities that supplied such fraternities with benefits could still violate the law.²⁷³ This holding rested on the fact that universities themselves were not free to discriminate on the basis of race.²⁷⁴ By supporting legally discriminatory fraternal organizations, universities indirectly participated in racial discrimination.²⁷⁵ Universities' indirect roles in other parties' legal dis-

267. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 566 (9th Cir. 1990).

268. In addition to Unruh Act guarantees, many California universities have non-discrimination policies expressly prohibiting discrimination on the grounds of sexual orientation. *STANFORD UNIV.*, *supra* note 2, at 1; *UNIVERSITY OF CAL., BERKELEY*, *supra* note 2, at 45; *UNIVERSITY OF CAL., DAVIS*, *supra* note 2, at 2; *UNIVERSITY OF CAL., HASTINGS COLLEGE OF THE LAW*, *supra* note 1, at 47; *UNIVERSITY OF CAL., LOS ANGELES*, *supra* note 1, at 47.

269. See *supra* note 5. See also *Gilligan v. Morgan*, 413 U.S. 1 (1973) (decisions regarding composition, training, equipping and control of military forces are best left with legislative and executive branches of government).

270. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941) (fields of dominant federal interest will preclude enforcement of state laws on same subject). The power to raise a militia is a dominant federal interest, expressly granted to Congress in the Constitution. See U.S. CONST. art. 1, § 8, cl. 16.

271. See CAL. CONST. art. IX, § 9 (state universities may be sued).

272. 32 Op. Att'y Gen. 264, 275 (1959). Private associations such as fraternities were legally allowed to restrict their membership on the basis of race. *Id.* "Certainly under the present law a state can constitutionally incorporate a fraternity which restricts its membership on the basis of race." *Id.* at 272.

273. *Id.* at 272-73.

274. *Id.* at 273.

275. *Id.* The Attorney General held that if universities maintained control over the frater-

crimination, however, were found to be impermissible.²⁷⁶ This holding partially rested on California's public policy against discrimination.²⁷⁷ The Unruh Act would bar universities from directly discriminating against gays and lesbians.²⁷⁸

Universities that allow the military to recruit on-campus, support discrimination that is legal when practiced by the military, yet illegal when practiced by universities. Military recruiters, like fraternities, receive support in the form of services offered by universities.²⁷⁹ The fact that the military may legally discriminate against gays and lesbians, therefore, does not necessarily shield universities from liability for their violations of the Unruh Act.²⁸⁰

The relationship between the military and universities, with respect to recruiting, is unique. It is the military that actively discriminates against gays and lesbians; however, universities hold military recruiting out as a part of their own service. The service offered by universities,

nities and supplied them with assistance, there would be "little doubt but that such a relationship with fraternities which restrict membership on the basis of race, color, creed, or religion would be invalid as against public policy" *Id.*

276. *Id.*

277. *Id.* The holding alternatively rested on the equal protection clause of the fourteenth amendment. Aid to discriminatory fraternities from state universities would constitute state action and, therefore, be prohibited by the United States Constitution. *Id.* at 272-73.

278. See *supra* notes 36-79 and accompanying text.

279. Fraternities may receive university support in housing, use of school facilities, and financial support. Horowitz, *Discriminatory Fraternities at State Universities*, 25 S. CAL. L. REV. 289, 290 (1952). The services provided to military recruiters may include the provision of data base information on students, rooms for interviews, and administrative assistance in arranging interviews. See STANFORD UNIV., *supra* note 2, at 47; UNIVERSITY OF CAL., HASTINGS COLLEGE OF THE LAW, *supra* note 1, at 20; Adams, *supra* note 224, at 4, col. 5.

280. Universities might argue that if liability were imposed for their cooperation with the military, this would prohibit them from cooperating with firms which have instituted affirmative action hiring programs. The only difference, they would argue, is the group being offered unequal services. The two situations, however, are distinguishable. Affirmative action hiring practices by a firm would not be violative of California's public policy. See *Price v. Civil Service Comm'n of Sacramento*, 26 Cal. 3d 257, 270, 604 P.2d 1365, 1373, 161 Cal. Rptr. 475, 483 (1980). In that case, an employer's attempt to remedy past discrimination, by voluntarily adopting a race conscious hiring program was held to be a positive step in helping to create equal job opportunities to historically excluded groups. *Id.* at 273, 604 P.2d at 1375, 161 Cal. Rptr. at 485. The military's discrimination, however, does not constitute a positive step toward curing past discrimination. Universities are allowed to take race into account in admissions decisions. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-20 (1978). Universities are also allowed to institute affirmative action programs to cure their own past discrimination. See *Price*, 26 Cal. 3d at 270, 604 P.2d at 1373, 161 Cal. Rptr. at 483. Universities could not offer unequal services to their gay and lesbian students, however, since this would not constitute a step toward effecting the underlying purposes of California's public policy.

therefore, is inherently unequal.²⁸¹ This situation is different from printing a business printing military recruiting posters or a hotel renting rooms to the armed services for conducting recruiting interviews.²⁸² In each of those instances, the business furthers the military's discriminatory recruiting practices, yet neither the printer nor the hotel directly provides unequal services. While they may be aiding the military in its discriminatory practices, the printer and the hotel owner would not violate the Unruh Act unless they arbitrarily offered unequal services to their own customers.²⁸³ In contrast, universities that sponsor military recruiters provide their heterosexual students employment opportunities that are denied to gay and lesbian students.

IV. PROPOSAL

While this Comment is primarily designed to be a tool for potential litigants wishing to challenge California universities' cooperation with military recruiters, the underlying purpose is to keep California universities from aiding in military recruiting discrimination. This purpose could be accomplished by methods other than litigation. First, this Comment may persuade universities to voluntarily ban military on-campus recruiting until the military changes its discriminatory policy.²⁸⁴ Second, if the problem persists, this Comment calls upon either the California Legislature or interested citizen groups to request that the Attorney General write an advisory opinion setting forth the legality of cooperation between universities and military recruiters. The Comment also argues for the reversal of the decision in *United States v. City of Philadelphia*.

V. CONCLUSION

By providing Career Placement Center programs, universities proffer a valuable service to their students. Once that burden is undertaken,

281. See *supra* notes 221-27.

282. See *United States v. City of Philadelphia*, 798 F.2d 81, 88 n.8 (3d Cir. 1986).

283. See *Stoumen v. Reilly*, 37 Cal. 2d 712, 715, 234 P.2d 969, 971 (1951).

284. The Association of American Law Schools has passed a resolution requiring employers wishing to recruit on campus to sign non-discrimination policies which include prohibitions on sexual orientation discrimination. Nat'l L.J., *supra* note 3, at 17, col. 1. Those schools that do not comply with this policy risk losing their accreditation. *Id.* In response to this policy, the University of Chicago Law School has barred the military from utilizing its placement facilities until they change their discriminatory policy. *Id.* The University of California, Los Angeles Law School allows military recruiting to take place on campus, but only because they are forced to by the university. *Id.* In addition to these actions, students are taking an active role in demanding an end to universities' compliance with military discrimination. See *supra* note 3.

universities should be required to abide by the laws of the state in which they are located. When universities allow the military to interview on campus they provide students with access to military job openings. The military practices discriminatory policies regarding homosexuals and universities facilitate certain job openings to heterosexual, but not homosexual, students. Thus, the services provided by universities are unequal and, in California, violate the Unruh Act. In this context, the Unruh Act would not be preempted by federal law because: (1) discrimination in the provision of services is a field traditionally regulated by the state; (2) Congress did not show a "clear and manifest" intent to preempt state law with the passage of section 606(a); and, (3) the Unruh Act does not actually conflict with section 606(a). California's valid interest in purging arbitrary discrimination from community life should bar universities from facilitating military homophobia.

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